BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Opinions Below

The opinion of the District Court for the Western District of Kentucky is set out at pages 74-82 of the Record and is officially reported as *General Shale Products Co.* v. *Struck Constr. Co.*, 37 F. Supp., 598.

The opinion of the Sixth Circuit is set forth on pages 89-98 of the record and is as yet unreported.

II. Grounds of Jurisdiction

Jurisdiction is invoked under the provisions of Section 347, Title 28, United States Code, which authorizes review of final decisions of the Circuit Courts of Appeals by writs of certiorari.

The opinion and judgment of the Circuit Court of Appeals was filed December 2nd, 1941, and no motion for rehearing was filed.

III. Statement of the Case.

The Louisville Housing Commission was created by an Act of the Kentucky Legislature in 1934, with power to operate, manage and control low cost housing projects in the City of Louisville. (R. 84).

In the early summer of 1939, the Commission undertook the construction of its second project in Louisville, known as Ky. 1-2.

The respondent, Struck Construction Company, was awarded the general contract for the demolition of a great number of old buildings and the construction of about 59 building units, at the general contract price of $1,731,000. (R. 26).

The Housing Commission, in the general contract, expressly reserved to itself the right to later select the brick (R. 38) that would be used in the buildings, and for the purpose of the general contract it was *assumed* or *estimated* that the brick would cost $20.00 per thousand. It was expressly provided that the general contract price was to be adjusted later in exact accordance with the actual price of the brick. Under the laws of Kentucky, the award shall be made to the best bidder. (*Kentucky Statutes*, Carrolls 1936 Revision, Sec. 2741x-4).

> "* * * For the purpose of this bid the Contractor shall figure the *price* of these face brick at $20.00 per M. delivered at the building with the customary cash discount of $1.00 per M. Should a brick be selected which varies in *price* from the above amount, such difference shall be adjusted with the Contractor, the Local Authority receiving a deduction or paying an extra as the case may be."
>
> (Specifications of the Housing Commission, quoted in Respondent's Answer, R. 7; italics ours).
>
> "* * * The only variable factor then in your bid as it was submitted, as related to the total amount of the base bid, would depend upon the *price* of the brick ultimately selected by the owner?
>
> "A. That is right."
>
> (Testimony of Officer of Respondent Struck Construction Company, R. 37; italics ours).

After the contract was awarded to Struck, its President, Mr. Nichol, urged the Commission to promptly select the brick it desired, (R. 38), but before the Commission would make a decision they first had to secure prices on the brick they would use. (R. 38). The Commission therefore instructed Struck to secure panels of sample face brick and prices from various manufacturers.

The petitioner, General Shale Products, is a brick manufacturer (R. 1) and its product, known as "Speedbrik," (a trade mark name) (R. 1) is produced of the same raw material as all brick, the difference being that "Speedbrik" is larger than standard size brick. Struck's answer concedes "Speedbrik is much larger than face brick." (R. 7).

As a consequence, not as many brick are required to cover the same area as with standard size brick, thereby giving a great labor saving advantage. It is therefore readily apparent that it cannot be compared with standard size brick on a price per M. basis, although of course comparisons may be figured and it is in direct competition with standard sized brick as is evidenced by the fact that the architects for the Housing Commission specified alternate bids for "Speedbrik" and standard size brick. (R. 7, 27).

We mention this because the Court of Appeals labored under the misapprehension that "Speedbrik" was not brick. That "Speedbrik" successfully compares and competes with standard size brick is evident by the fact that it was specified by the Housing Commission's architects and was actually used in the construction of the Housing Commission's first project (R. 33, 34) where the respondent Struck was not the general contractor (R. 33, 34) and so was not in a position to work the same scheme to throw the sub-contract for the brick to Southern Brick Company, as was done on this second housing project.

After Struck was awarded the general contract, it then invited bids from a large number of concerns (R. 39), including the petitioner and the respondent Southern Brick Company, and received offers for standard size brick ranging from a high of $18.25 to a low of $16.75 per M. (R. 39) —that of the respondent Southern Brick Company being $18.00, almost the highest. (R. 40). Panels of the various brick were set up for the inspection of the Commission and

it was advised of the prices quoted on the brick. At the lowest price bid for standard size brick, $16.75 per M., it developed that Alternate No. 1 for Speedbrik was still lower by some $5000. (R. 41) and as low bidder should receive the contract.

Before the Commission made a decision (R. 41) however, the respondent Struck approached the Housing Commission, verbally offering to reduce the price if Southern Brick Company's brick were used, by an amount necessary to offset the low bid of Speedbrik. (R. 42). In the discussion, it was revealed that to offset the low bid submitted by Speedbrik, the Southern Brick Company's brick would have to be furnished to the Commission at $14.09 per M. (R. 42, 43). By reducing the price from the original offer for respondent's brick of $18.00 per M. to $14.09 per M, the standard size brick would be $13,002.00 less than the general contract price, and would be $2.00 less than alternate No. 1 for Speedbrik. Note that this is not $2.00 per M. less than Speedbrik, but $2.00 less on the entire 2 million or more brick supplied.

It is undisputed—indeed the testimony is that of the respondent's own officers,—that the price of the brick, $14.09 per M, finally offered to the Commission was arrived at in the above manner. (R. 42, 43). That is, the reduction from $18.00 originally bid by the Southern Brick Company, to the $14.09 offered to the Commission was arrived at arbitrarily, in order to be $2.00 less than the bid of Speedbrik, and it was not arrived at, in the terms of the Robinson Patman amendment, because of "due allowance for difference in the cost of manufacture, sale or delivery *only*".

While the respondents Struck and Southern Brick Company deny that there was any concert of action or conspiracy between them, the undisputed facts are that after the bids were filed the Southern Brick Company knew petitioner's bid was low (R. 64); before any award was made to peti-

tioner Mr. Nichol and Mr. Bishop, officers of the respective respondents, conferred together (R. 68) and the Brick Company was informed that if their price was reduced they could receive the contract. (R. 68). It is undisputed that although many concerns were originally solicited by Struck for bids to supply brick (R. 39), not a single one other than the respondent Brick Company was permitted to offer to reduce their prices, nor was the petitioner given an opportunity to again bid, (R. 57). Whether there was a conspiracy or combination, in fact, between the respondents, is not an issue in this Court, nor was it in the Courts below, for there was no trial of disputed fact questions, as later explained.

The result of the foregoing transactions was that the Commission rejected Alternate No. 1 for Speedbrik and designated the brick should be supplied by the respondent Southern Brick Company, at the price to the Commission of $14.09 per M. It is undisputed that the price of $14.09 per M. would not have been granted to anyone else (R. 52) and that brick could not be bought in Louisville for $14.09 per M. or for anything less than $16.75 per M. from anyone. (R. 50).

The petitioner thereupon filed action in the District Court, complaining that the respondents had combined together to lessen competition offered by the petitioner and eliminate the petitioner, by means of this scheme to reduce the price to the ultimate recipient, the Housing Commission.

To this complaint, the respondents Struck Construction Company and Southern Brick Company answered separately (R. 4; 9). Both answers deny the existence in fact of any conspiracy. The answer of Struck concedes the price concession above described, but attempts to justify the reduction upon the ground that it, Struck, had incorrectly estimated its own labor costs in laying Speedbrik, and to re-

duce or avoid that loss, it was willing to take a loss of brick. This defense resembles the well-known "loss-leader" principle in retail selling, whereby one manufacturer's article is sacrificed or sold at a loss, in the hopes of making a profit on other items—one of the underlying reasons which caused the enactment of the Robinson Patman amendment.

Both answers also set forth that the brick was furnished under the general contract for construction work for the Housing Commission a "public" or "governmental agency".

Before trial, it became apparent that there were three basic questions of law that would have to be determined. The respondents contended that the federal anti-trust laws were entirely irrelevant because: 1). the transaction was with the Municipal Housing Commission and impliedly exempt; 2). that the contract was part of a general "construction" contract and that the anti-trust laws had no application thereto, and 3). that the respondents were not engaged in interstate commerce.

As to the third question,—interstate commerce—the District Court found from the facts that the respondents were engaged in interstate commerce, there was evidence in support of this finding, no cross-appeal was taken by the respondents, and the Court of Appeals did not disturb the finding of the District Court, so that issue is not presented by this petition.

The Rules of Civil Procedure became effective September 1, 1938, and this action was instituted September 22, 1939 (R. 1) before any body of authority had accumulated as to the nature of pre-trial hearings, and indeed the limits of pre-trial procedure are not yet clearly defined.

In keeping with the spirit of the rules, these three issues of law were submitted to the District Court by the parties, through a stipulation. The original pre-trial order provided: (R. 14)

> * * * "the respective parties * * * announced they were ready to be heard on the pleadings and the depositions on the following *two* questions:
>
> "1. Whether * * * Struck * * * and the Brick Company, or either, were engaged in interstate commerce * * * and
>
> "2. Whether the Clayton Act, as amended * * * prohibits concessions to * * * the Housing Commission."

and by supplemental order (R. 82, 83) the pre-trial order was extended to cover the questions:

> "1. Whether the * * * Housing Commission is a governmental agency * * * and
>
> "2. Whether the defendant Struck * * * was a seller of commodities * * *."

Since it was only the above questions that were submitted to the District Court, no evidence pertaining to the question of whether a conspiracy in fact existed, the extent of damages, the competitive qualities of Speedbrik and other brick, or anything else was necessary. However, to have the facts relating to the transaction with the Housing Commission in the record, depositions of two officers of the respondents were taken, and the facts for the decision of the two questions presented by this record are without substantial dispute.

IV. Specification of Errors.

The full and complete record having been taken from the District Court to the Circuit Court of Appeals, under Rule 75(d) of the Rules of Civil Procdure, no formal assignment or statement of errors was necessary, or filed, in the Courts below.

In this Court, petitioner complains that the Court of Appeals erred in affirming the decision of the District Court

dismissing the petition upon pre-trial hearing for the following reasons:

First: The Court of Appeals erred in holding that the anti-trust laws had no application to the case at bar because the transaction constituted a "construction" contract, as opposed to a "sale of brick".

(A) There is no precedent for the conclusion that a "construction" contract is not within the purview of the anti-trust laws.

(B) Even if a "construction" contract is not within the scope of the anti-trust laws, the transaction at bar constitutes a "sale" of brick so as to be within the terms of the Act.

Second: The Court of Appeals erred in affirming the decision of the District Court, which held that the Housing Commission was a governmental agency impliedly exempt from the anti-trust laws.

V. Argument.

Our argument may be summarized as follows:

First: The Court of Appeals and the District Court erred in concluding that the anti-trust laws had no application to the transaction at bar, because it constituted in law a "construction" contract, as opposed to a "sale" of brick.

(a) There is no precedent nor basis for the view that a "construction" contract is not within the purview of the anti-trust laws.

(b) Even if a "construction" contract is not within the purview of the anti-trust laws, the transaction at bar constitutes a "sale" within the meaning of the Act.

Second: Transactions between two ordinary business corporations and the Housing Commission are not exempt from the anti-trust laws.

(a) The Housing Commission is not a party.

(b) The Housing Commission comes within the express definition of the anti-trust laws.

(c) The Kentucky legislature has withdrawn the attribute of sovereignty from the Housing Commission.

First: The Court of Appeals and the District Court erred in concluding that the anti-trust laws had no application to the transaction at bar, because the transaction constituted in law a "construction" contract, as opposed to a "sale" of brick.

(A) There is no precedent nor basis for the view that a "construction" contract is not within the purview of the anti-trust laws.

While the District Court, (R. 80) in its opinion cites cases holding under Statutes of Frauds and similar Acts that there is a distinction between "construction" contracts and "sales" contracts, neither the District Court nor the Court of Appeals cite any authority for their conclusion that if this was a "construction" contract it fell without the terms of the anti-trust laws.

Such a novel proposition, after the many years the Sherman Act has been in effect, greatly limiting the scope of that Act by removing the entire construction industry from under its terms, surely requires consideration.

We believe the error into which the Courts below were led, was due to a failure to consider the Robinson Patman Act in its proper sphere as an amendment to the general anti-trust laws, rather than as a law complete unto itself.

It is to be noted that neither the opinion of the District Court nor the Court of Appeals refers to or considers the Sherman Act, but only the limited terms of the Robinson-Patman amendment.

The Sherman Act, *15 U. S. Code*, Sec. 1, declares:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states * * * is hereby declared to be illegal." 15 U. S. Code. Sec. 1.
>
> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue * * * and recover * * * damages * * *". *15 U. S. Code*, Sec. 15.

This Court is all too familiar with the history leading up to the enactment of the Sherman Act, including the growth of trust and monopolies by means, among others, of price wars, price fixing and price cutting. Such methods of competition were condemned at common law, but it was to remove any doubt as to the applicability of the common law in the United States Courts that the Sherman Act was passed. *U. S.* v. *Addyston Co.* 85 Fed. 271, 279 (6th C.C.A. Taft, J.)

The Sherman Act was broad and general in its terms. The Clayton Act and the Robinson Patman Act were passed, not to repeal the Sherman Act, but to make specific some of its applications. Among the subjects clarified by the amendatory acts was that of price discrimination in the sale of merchandise. But because the Robinson Patman Act specifically defines sales and purchases of merchandise there is no ground nor authority for concluding that the Sherman Act should not apply to restraints of trade in the construction industry.

The Clayton Act, as amended by the Robinson Patman Act expressly condemns the lessening of competition by means of price discriminations:

> "It shall be unlawful * * * to discriminate in price between different purchasers * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination * * *". *15 U. S. Code*, Sec. 13.(a).

and to emphasize the condemnation, the Act prohibits indirect discriminations by rebates,—such as Struck seeks to justify here,—a making up of a loss in some other way:

> "It shall be unlawful * * * to pay or grant * * * or to receive or accept, anything of value as a commission, brokerage, or any other compensation, or any allowance or discount in lieu thereof, except for services rendered * * *" *15 U. S. Code*, Sec. 13 (c).
>
> "It shall be unlawful * * * to pay or contract for the payment of anything of value to or for the benefit of a customer of such person * * * in connection with the processing, handling, sale * * * unless such payment * * * is available * * * to all other customers * * *". *15 U. S. Code*, Sec. 13 (d).

A person who induces another to make a discrimination is equally guilty:

> "It shall be unlawful * * * knowingly to induce or receive a discrimination in price * * *". *15 U. S. Code*, Sec. 13 (f).

and underselling in particular localities is forbidden:

> "It shall be unlawful * * * to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competition * * *". *15 U. S. Code*, Sec. 13a.

or to sell at unreasonably low prices to eliminate a competitor:

> "' ' ' or to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor ' ' '". *15 U. S. Code*, Sec. 13a.

Bear in mind that the price of $14.09 was admittedly fixed to be just $2.00 under the petitioner's bid, and that the lowest price for brick of respondent Southern Brick or other manufacturers of standard size brick in Louisville was $16.75. (R. 50).

It is true that the Robinson-Patman amendment does legalize sales made at different prices, but only in bona fide cases justified by differences in the cost of *manufacture, sale* or *delivery only*:

> "' ' ' provided ' ' ' That nothing contained in ' ' ' this title shall prevent differentials which make *only* due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered ' ' ' ". *15 U. S. Code*, Sec. 13.

While it is true that the two million brick in this case constitute an unusual quantity, and a difference in price on that basis against a smaller quantity would be justified under the Act, there is no pretense that the reduction from $18.00 per M. originally bid by Southern Brick to $14.09 actually charged the commission, was due *only* to such unusual quantity, but it is conceded that this price was arbitrarily arrived at solely and wholly to be $2.00 less than the "Speedbrik" price. (R. 42, 43).

It is also true that the Robinson-Patman amendment does legalize sales made at a lower price to "meet" an "equally" low price of a competitor:

> "* * * provided, however, That nothing * * * in this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * was made in good faith to *meet* an *equally* low price of a competitor * * *". *15 U. S. Code*, Sec. 13.

But in the case at bar the price of $14.09 was not made to "meet" the "equal" price of "Speedbrik" but was made to "beat" the "Speedbrik" price, and was not *"equal"* to the "Speedbrik" competition, but went below it purposely, in order to eliminate it.

It is respectfully urged that the proper construction of the effect of the Robinson Patman amendment is not that it legalized all combinations or restraints of trade except those involving "sales" or "purchases" of merchandise, but on the contrary that combinations of two or more persons to eliminate a competitor are illegal, *unless* it can be shown that it comes within the *exceptions* permitted by the Robinson-Patman amendment for "sales" which are made bona fide because of differences in the cost of *manufacture, sale* or *delivery* of the commodity, *ONLY*. Not having brought themselves under the *exception* permitted by the Robinson Patman Act of sales made because of differences in costs *only*, the respondents remain under the general prohibition of the Sherman Act against combinations to injure a competitor.

If the foregoing contention is not the proper construction of the Robinson-Patman amendments, then the extensive construction industry in the United States is removed from the protection of the Sherman Act. If the decision below stands anyone furnishing lumber, bricks, plumbing, lighting or other

products for the building of a house, office building, apartment or factory is exempt from the anti-trust laws. All that need be done is for the owner to reserve the right to designate the particular brick or other article, and to provide the general contract price shall slide accordingly, just as with the contract at bar. Then the general contractor may connive freely with his pet brick, lumber or plumbing dealer to lower the price sufficiently to eliminate any competitor.

It is respectfully submitted that this Court ought long to consider before placing the stamp of approval upon the principle established by the Courts below, without any precedent and contrary to the entire history and interpretation of the anti-trust laws in the past.

(b) Even if a "construction" contract is not within the purview of the anti-trust laws, the transaction at bar constitutes a "sale" of brick within the meaning of the Act.

It cannot be disputed that originally the brick in question was manufactured and owned by the Southern Brick Company, and that ultimately the ownership was transferred to the Housing Commission. It cannot be disputed that the Houing Commission's contract provided that the brick should be furnished at the stipulated "*price*" in money, of $14.09 per M. There was an actual transfer of ownership, for a price, whether the transfer is regarded as having been accomplished by means of a technical passing of title from the Brick Company to Struck, who in turn transferred to the Housing Commission, or whether Struck is regarded as merely an agent, and that title passed directly from the Brick Company to the Housing Commission.

The important fact is that the complaint charges the price was fixed as a result of *plan* or *conspiracy* between Struck

and Southern Brick, and the method of transfer of title is immaterial.

Transfer of ownership, at an agreed price, is in and of itself a "sale" within the usual and ordinary meaning of that term.

> "Sale * * * a contract whereby the absolute, or general, ownership of property is transferred from one person to another for a *price*, or sum of money, or, loosely, for any consideration."—*Webster's Dictionary* (Italics ours).
>
> "A sale in the ordinary sense of the word is a transfer of property for a fixed price in money or its equivalent."—*Iowa* v. *McFarland*, 110 U. S. 471.
>
> "Blackstone's definition of a sale is 'a transmutation of property from one man to another in consideration of some price.' 2 Bl. 446. Kent's is 'a contract for the transfer of property from one person to another.' 2 Kent, 615. Bigelow, C. J., defines it in these words: 'competent parties to enter into a contract, an agreement to sell, the mutual assent of the parties to the subject-matter of the sale, and the price to be paid therefor.' *Gardner* v. *Lane*, 12 Allen, 39, 43. A learned author says 'If any one of the ingredients be wanting, there is no sale.' Atkinson on Sales, 5. Benjamin on Sales, p. 1, note and p. 2 says: 'To constitute a valid sale, there must be (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the buyer; (4) a price in money, paid or promised." —*Butler* v. *Thomson*, 92 U. S. 412, 414.

To the same effect: 55 *Corpus Juris*, Sec. 1, p. 36, and cases cited; *Rogers* v. *Commissioner*, 103 F. (2d) 790, 792 (9th C.C.A.).

In construing the term "sale" in the anti-trust acts, it is this ordinary sense that is to be applied (*DeGanay* v. *Leder-*

er, 250 U. S. 376, 381; *Commissioner* v. *Freihofer*, 102 F. (2d) 787 (3d C.C.A.)) and not some of the many restricted connotations of the term.

> "However, as used by the authorities, 'sale' is not a word of fixed and invariable meaning, but may be given a narrow or broad meaning, according to the context, or the surrounding circumstances and the conduct of the parties."—55 *Corpus Juris*, Sec. 1, pp. 36, 37.

Because there have been a great many decisions interpreting "sale" under the Sales Acts and Statute of Frauds, which by their terms are restricted to sales of personal property, and which by interpretation have been held, almost universally (2 Williston on Contracts, Rev. Ed., Sec. 508, p. 1480), not to apply to contracts for work and material, or construction, as distinguished from an ordinary mercantile sale, unless one is careful, these decisions are apt to be looked upon as giving the only meaning of "sale." Of course, a sale of real estate is not a "sale" under these sections of the Sales Acts and Statute of Frauds, which are expressly limited to sales of personal property, yet no one would question but that there may be a "sale" of real estate under the broad meaning of the term "sale."

Indeed, quite a body of nice distinctions and authority has accumulated under these Acts, as to what is a sale required to be in writing. Some words of caution have been enunciated by the courts against limiting the term "sale" in every case to such narrow meaning. For instance, Mr. Justice Holmes, in considering whether a State licensing law was a burden on interstate commerce was asked to consider the technical nicety of whether there was a "sale" by appropriation of brooms to orders from salesmen, and he warns:

> " 'Commerce among the several states' is a practical conception, not drawn from the 'witty diversities' (*Yaites* v. *Gough*, Yelv. 33) of the law of sales. *Swift & Co.* v. *U. S.*, 196 U. S. 375, 398, 399. The brooms were specifically appropriated to specific contracts in a *practical*, if not a *technical*, sense. Under such circumstances it is plain that, wherever might have been the title, the transport of the brooms for the purpose of fulfilling the contracts was protected commerce." *Rearick* v. *Pennsylvania*, 203 U. S. 507, 512.

So, a contract to manufacture a machine is clearly not a sale under the Sales Acts and Statute of Frauds, yet since there is a transfer of ownership, for a price, this may be a sale, under some other statute. For example, under the patent laws a "sale" two years before applying for a patent invalidates the patent. In *National Cash Register Co.* v. *American Cash Register Co.*, 178 Fed. 79, 83, the Kruse Company asked Juengst to "invent" or "get up" a cash register. Juengst did so, making one machine, and presented a bill for his work, labor and materials. (Opinion of the Court, page 81.) Later a patent was sought, the argument being advanced that this was not a "sale" of the article, but a contract for work and material. The Court conceded that this was not a "technical sale" under the Sales Acts, but pointed out that cases arising under those acts should not be confused with broader meanings of the term "sales," saying:

> "The more serious question whether the transaction between the Juengst firm and the Kruse Company amounted to a sale of the machine grows out of the distinction in the law of sales between a contract to manufacture and a contract to sell. The latter falls within, and the former without, the statute of frauds, and the decisions both in this country

> and in England draw fine distinctions and are the reverse of uniform. Undoubtedly, according to the weight of authority, the contract we are considering would not be a sale within the statute of frauds. And yet we think that the application of the patent act should not be made to depend upon the 'witty diversities' (Yelv. 33) of the law of sales. *Rearick* v. *Pennsylvania*, 203 U. S. 507."

Again, a restauranteur or innkeeper does not come within the technical term "sale" under the Sales Act or Statute of Frauds in furnishing meals or lodging, yet for the purpose of other acts, there may be a sale. So, including oleomargarine in a meal, was a "sale" in violation of Statute (*Commonwealth* v. *Miller*, 131 Pa. St. 118), as was furnishing milk below standard (*Commonwealth* v. *Veith*, 155 Mass. 442). In *Skermetta* v. *State*, 107 Miss. 429, wine was served at meals to a roomer and boarder, who paid by the week and no extra charge was made for the wine, yet the Court held there was a "sale" in violation of the licensing law, although no one would contend that this was a technical sale under the Sales Acts or Statutes of Fraud. See also *Seelbach Hotel Co.* v. *Commonwealth*, 135 Ky. 376. How much stronger is the case at bar, where a specific price was set on the brick.

Undoubtedly a physician, in treating his patient and administering pills, medicine or bandages, is not making a "sale" so as to come within the Sales Acts or Statutes of Fraud. Yet injection of narcotics is a transfer of ownership of the narcotic, for a consideration, and may be a "sale" in violation of the narcotic laws. *Ratigan* v. *United States*, 88 F. (2d) 919, where a conviction was upheld for a "sale" of narcotics, although administered by injection and never actually handled by the patient, any more than the bricks were by the Housing Commission here.

And this Court recently, in *American Medical Ass'n.* v. *U. S.* (Jan. 18, 1943) found the Association subject to the anti-trust laws, though no technical "sale" is made by physicians.

In a broad sense the Louisville Municipal Housing Commission was purchasing and acquiring the brick and other materials that went into the buildings as well as the work and labor of the contractors. If the Act is to be construed so as to exempt all transactions where materials are transferred from one person to another in conjunction with work and labor thereon, the effectiveness of the Act will in large measure be destroyed. The Act was intended to have a broad general scope covering the field of commercial activity. It cannot be supposed that the purpose of preventing a lessening of competition is any less important in one character of commercial transaction than another. The Act should be given a broad construction for effectual purpose unless some compelling reason forces a narrower construction.

Furthermore it will be recalled that the specifications and the construction contract, untimately entered into, were firm in all respects, save and except for the price of the brick for the exterior walls of the building. The Commission reserved the right to determine not only which of the competing materials was to be used, but also the price of the brick, if this type of construction was selected. Therefore, the amount that was to be charged for work and labor was separate and distinct from the amount that was to be charged for the brick. There was no undertaking, under the contract, to furnish brick of a certain type and grade, together with the necessary work and labor. Rather, the undertaking was one to furnish work and labor and to sell the brick at a price later to be determined.

The contractor had no control over the *selection* of the brick, no interest in the *price* at which the brick was to be purchased by the Commission because under the specifications, any variation in the price of the brick would be adjusted between him and the Housing Commission (R. 7), and no profit in the brick, this profit on this item being limited to a profit in the installation costs. Struck computed the cost of laying the brick separately from the acquisition cost thereof (R. 30-31).

As the price of the brick was the only variable factor, in order to bring the base bid price below the price of Alternate No. 1 and eliminate appellant's product, Speedbrik, the parties had to negotiate in terms of the selling price of brick from Struck to the Housing Commission. This they proceeded to do treating the sale of the brick as a separate and independent transaction. (R. 42).

In view of the foregoing, the general contract must be divided into two phases: the first, an undertaking to furnish work and labor necessary to install the brick in the building; and the second, an undertaking to procure for and sell to the Commission at an agreed price, whatever brick the Commission chose for the installation. Under such state of facts, the general principles expressed by the Courts below would not be applicable, for actually there was no contract for labor and material, but instead two contracts: one for labor and one for the sale of material.

Second: Transactions with the Housing Commission are not Exempt from the Anti-Trust Laws.

The District Court concluded that the Louisville Municipal Housing Commission was a governmental agency, citing *Spahn* v. *Stewart*, 268 Ky. 97 (R. 84) and that an implied exemption must be read into the anti-trust laws, upon the

principle that the sovereign is exempt from the operation of legislation, unless named specifically.

The Court of Appeals refrained from considering this question, basing its affirmance upon the theory that the anti-trust laws had no application since the transaction constituted a "construction contract." If the Court of Appeals was wrong as to the reason assigned, it yet remains to consider whether the District Court is to be affirmed because of any exemption of the Housing Commission.

(a) *The Housing Commission is Not a Party.* At the outset, it should be borne in mind that the Housing Commission is not a party in the case at bar, and whether it could have been guilty of a violation of the anti-trust laws of the United States is not before this Court; the only issue is whether the two respondents, both ordinary business corporations, entered into a prohibited combination.

(b) *The Housing Commission is Expressly Covered by the Anti-Trust Laws.* If the principle that the sovereign is exempt from Acts unless named therein be accepted, the complete refutation of the conclusion of the District Court is found in the fact that the anti-trust laws do expressly include agencies such as the Housing Commission. The anti-trust laws prohibit generally "any person" from engaging in the prohibited acts. Section 8 of the Sherman Act, now Section 7, Title 15, United States Code, and Section 1 of the Clayton Act, now Section 12, Title 15, United States Code, have practically identical definitions of the term "person":

> "The word 'person' or 'persons' wherever used in * * * this title shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States * * * [or] * * * the laws of any State * * *"
>
> —15 *U. S. Code*, Sec. 7 and 12.

The Louisville Municipal Housing Commission was created under the laws of the State of Kentucky, and is declared to be a "body corporate":

> "The persons appointed as provided herein shall constitute a *body corporate* under the name of (insert name of city) Municipal Housing Commission, and shall have the power to contract and be contracted with, to sue or be sued in such name * * *" (italics ours).
>
> —*Kentucky Statutes* (Carroll's 1936 Revision) Sec. 2741x-2.

The identical question has already been before this Court, in decisions which the District Court failed to follow. In the case of *Chattanooga Foundry Co.* v. *Atlanta*, 203 U. S. 390, this Court speaking through Mr. Justice Holmes found that the City of Atlanta was a "person" within the definition of Section 8 of the Sherman Act, now Section 7 of Title 15, U. S. Code, quoted above. At page 396 of the opinion Mr. Justice Holmes states:

> "The city was a person within the meaning of Sec. 7 by the express provision of Sec. 8."

In *United States* v. *California*, 297 U. S. 175, this Court said, page 186:

> "Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it (citing cases) * * * This rule has its historical basis in the English doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. *United States* v. *Herron*, supra, (20 Wall. 255, 22 L. Ed. 276); *Dollar Sav. Bank* v. *United States*, 19 Wall. 227, 239, 22 L. Ed. 80, 82. The presumption is an aid to consistent construction of statutes of the

enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated. See *Baltimore Nat. Bank* v. *State Tax Commission*, decided this day (297 U. S. 209, post, 586, 56 S. Ct. 417). We can perceive no reason for extending it so as to exempt a business carried on by a state from the otherwise applicable provisions of an Act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action. Language and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artifical."

And since the decision of the District Court was rendered this Court has decided in the case of *Georgia* v. *Evans*, 316 U. S. 159, that a state is a 'person' within the meaning of Section 15, Title 15, United States Code, which gives "any person" injured by a violation of the anti-trust laws a right of action.

(c) The Kentucky Legislature has withdrawn the attribute of "sovereignty" from the Housing Commission.

If, as a matter of abstract law, the State of Kentucky could confer the immunities of the sovereign upon agencies created by it, it has not done so, but on the contrary many provisions of the creating law manifest the intention that the Commission should not have such immunities. The Housing Commission was created under the provisions of Kentucky Statutes 2741x-1 to 15 (Carroll's 1936 Revision) (R. 84). So far as here pertinent those sections provide:

> "Cities of the first and second class are hereby authorized and empowered to acquire, establish, erect, maintain and operate low cost housing projects * * * for the purpose of providing adequate and sanitary living quarters for individuals and families. It is hereby declared as a matter of legislative determination that in order to promote and protect the health, safety, morals and welfare of the public it is necessary in the public interest to confer these powers upon cities * * * and that the powers herein conferred upon the cities and the municipal housing commissions including the power to acquire property, to remove unsanitary or substandard conditions, to construct and operate housing accomodations and to borrow, expend and repay moneys for the purposes herein set forth are public objects essential to the public interest." *K.S.* 2741x-1.

Significantly, the Legislature has not endowed the Commission with the attributes of sovereignty such as immunity from suit and the power of taxation, but on the contrary has expressly leveled it with ordinary persons by providing that it may sue and be sued:

> * * * "The persons appointed as provided herein shall constitute a body corporate under the name of (insert name of city) Municipal Housing Commission, and shall have power to contract and be contracted with, to sue or be sued in such name and to adopt a seal * * *" *K.S.* 2741x-2.

and the buildings which it is to erect will be used in the ordinary affairs of every day life:

> "The words 'Municipal Low Cost Housing Project' whenever used in this Act, shall mean buildings containing rooms or sets of rooms to be leased as living quarters for families, or individuals, together with such shops, stores, garages, laundries,

> doctors' and dentists' offices and other facilities and appurtenances as may, in the judgment of the Commission, be reasonably necessary to the successful and economical operation of the project." *K.S.* 2741x-3.

and in erecting its buildings the Housing Commission is expressly made subject to, and is not above, ordinary laws:

> "* * * the municipal housing commission shall submit to city planning and zoning commission the location, character, and extent of any new street, square, park or other public way, ground or open space or any public building or structure or public utility for approval in the manner provided in Section 3037h-119 of Carroll's Kentucky Statutes; and all low cost housing projects shall be subject to the planning, zoning, sanitary and building laws, ordinances and regulations * * * No contract * * * exceeding in amount the sum of $2000.00 shall be made without advertising for bids, which bids shall be opened publicly and an award made to the best bidder, with power in the Commission to reject any or all bids." *K.S.* 2741x4.

The Commission cannot tax, but it may raise funds just as any ordinary individual or corporation may do, by borrowing money:

> "Cities * * * are hereby authorized to provide funds for carrying out the purposes of this Act by the issuance of revenue bonds of such cities pursuant to a resolution of the Housing Commission. Such bonds or other obligations of a Housing Commission *shall not constitute an obligation of the State, City or any other governmental subdivision agency or instrumentality thereof;* but shall be payable *only* out of the properties, revenues and assets of the Housing Commission * * * A Housing Com-

> mission may in connection with the borrowing of funds or otherwise enter into any agreements with the Federal Government, or any agency or instrumentality thereof, including specifically the Federal Emergency Administration of Public Works, and the Public Works Emergency Housing Corporation, * * *" *K.S.* 2741x-10 (Italics ours).

It is true that under the provisions of *K.S.* 2741x-10 the bonds issued by the authority shall be exempt from taxation by the State of Kentucky and its political subdivisions, but exemption from taxation is not an infallible test of sovereignty. Many charitable corporations, churches and cemeteries are often exempt from taxation, but no one has ever contended that such institutions are parts of the "sovereign". Indeed, there are many commercial and industrial enterprises whose businesses have been attracted into a jurisdiction by being given exemption from taxation for periods of time. In fact, the Court of Appeals of Kentucky held in the case of *Spahn* v. *Stewart*, 268 Ky. 98, relied upon by the District Court, that the exemption was justified because of the public purpose involved in the creation of the Commission, and it was on this ground and not on the ground of sovereignty that the exemptions mentioned in the Act were permitted.

Nor is the power of condemnation, *K.S.* 2741x6, which is given to the Commission controlling, for many public utilities, railroads and other non-governmental entities are given such power.

Nor could it be well contended that the right, expressed in the above statutes, to borrow from the Federal Government and its agencies is indicative of sovereignty, for as we point out in the petition for writ of certiorari filed herewith, it might be hard today to find a corporation, firm or individual which is not in that sense a sovereign, the right to

borrow from the United States or its agencies being well nigh universal, and having been extended to wheat, cotton, corn and other farmers, to home owners, to banks and distressed corporations approved by the Reconstruction Finance Corporation and to the multitude of concerns engaged in defense work.

The recital in Section 2741x-1 that it is the legislative and public policy to eliminate slums, is not an indication that in the method of elimination the legislature has made the Housing Commission sovereign. A like declaration, that it is the legislative and public policy to correct some abuse or circumstance is to be inferred, if not expressly declared, in nearly all legislation.

The clear intention of the legislature is to be found in the statement that bonds issued by the Commission, "shall not constitute an obligation of the State, city or any other governmental subdivision, agency or instrumentality thereof."

Finally, there have been a long line of cases in the Federal and the Kentucky Courts, holding that where the sovereign United States or a State creates a corporation or other agency which is given the power to sue and be sued, the intent to strip from that agency its sovereign character and immunities is manifested. The sovereign, of course, is immune from suit, and by removing that cloak the relinquishment of the attributes of sovereignty is indicated.

These cases go back to the time of Chief Justice Marshall in *Bank of the United States* v. *Planters' Bank of Georgia*, 9 Wheat. 904, 6 L. Ed. 244, and the doctrine enunciated has been recognized repeatedly ever since. Chief Justice Marshall states:

> "The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the bank, and waives *all* the privileges of that character." (Italics ours).

To the same effect see the following:

Bank of Kentucky v. *Wister*, 2 Peters, (U.S.) 318
Federal Sugar Refining Co. v. *U. S. Sugar Equalization Board*, 268 Fed. 575, 584. (D.C. 1920)
Gould Coupler Co. v. *U. S. Shipping Emergency Corp.* 261 Fed. 716 (D.C. 1919; L. Hand, J.)
Federal Housing Administration v. *Burr*, 309 U. S. 242, 249.

The Court of Appeals of Kentucky has by the same reasoning reached the same result, one of the leading cases being that of *Gross* v. *Kentucky Board of Managers of the World's Columbia Exposition*, 105 Ky. 840, which is directly appropos:

> "The rule is well settled that the State cannot be sued, and that the same protection is extended to the officers of the State. But this rule does not apply to a corporation created by the State for certain public purposes * * * It is not necessary that the thing created by the legislature should be named by it a corporation. Its character depends upon the powers given it, and not upon the name by which the legislature may call it."

In the case at bar, the Kentucky Legislature has expressly declared the Housing Commission to be a "body corporate", *K.S.* 2741x-2, quoted supra.

See also, *Williamson* v. *Kentucky Industrial School*, 95 Ky. 251.

Mr. Justice Frankfurter in *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, at page 390, note 3, has compiled a list of corporate bodies formed by the United States Government alone, and he states that Congress has provided for not less than forty corporations discharging governmental functions. This does not include many other corporations chartered under general State or District of

Columbia laws. Among those listed are the Federal Intermediate Credit Banks, The National Agricultural Credit Corporations, the Reconstruction Finance Corporation, The Federal Home Loan Bank, the Tennessee Valley Authority, The Home Owners Loan Corporation, the Federal Deposit Insurance Corporation, the Federal Farm Mortgage Corporations, the Federal Housing Administrator, the United States Housing Authority and the Federal Crop Insurance Corporation.

Add to these agencies the great number of persons, firms and corporations dealing with a multitude of State Agencies such as Housing Commissions, Highway Departments, Liquor Purchasing Departments and many others, and we respectfully submit that this Court should long hesitate to uphold the decision of the District Court declaring that persons competing for the business of these agencies can freely combine to restrain competition and injure a competitor, because these agencies are exempt from the anti-trust laws of the United States. The principle that the Sovereign is exempt from the operation of the anti-trust Acts should be confined strictly to the governmental activities of the United States itself, if at all.

Analysis of the Opinion of the Court of Appeals

The statement of facts in the opinion of the Court of Appeals is not wholly supported by the record.

The Court states "Speedbrik is not brick" (R. 90). We do not find such evidence in the record. It is true that respondent's officer described "Speedbrik" as a "masonry unit" (R. 27), but so is standard size brick; it is true "Speedbrik" eliminates the *necessity* of "back up tile" (R. 27), but it is common knowledge that "back up tile" is not a *necessity* in building a brick wall with standard size brick, and many houses have been constructed of brick two or three deep,

with no back up tile; it is conceded that "Speedbrik" is larger than standard size brick (R. 7, 1st par.) but none of these circumstances affords any ground for the erroneous statement of the Court of Appeals that "Speedbrik is not brick."

The reason that the record is perhaps not more clear is that neither the parties nor the District Court considered any such differences material. While the Robinson Patman Act does expressly prohibit differentials in prices in sales of commodities of "like quality and quantity" neither it nor the Sherman or Clayton Acts authorizes, for example, coal dealers to combine to eliminate suppliers of gas for heating, although their respective commodities are not identical; manufacturers of cement are not authorized to conspire to eliminate the competition of brick makers, nor does the Sherman Act, as amended by the Robinson Patman or Clayton Acts, anywhere indicate an intention that it be a defense to a conspiracy that the product sought to be driven from the market was not identical with that of the conspirators.

The Court states that bids for face brick were received from three companies, two bidding $16.75 per M. and Southern Brick at $18.00. This overlooks the evidence as to other suppliers (R. 39) and in fact the high bid was $18.25. Of all the suppliers not one was offered the opportunity to submit a second or lower bid, except Southern Brick Company (R. 57). This feature may be of importance when it comes to a consideration of a "conspiracy" in fact, although that question is not for determination now.

The important misapprehension of the Court of Appeals, we respectfully submit is this: While the Court concedes that "the trial court did not pass upon the question of * * * the alleged conspiracy and sale by both companies, for the obvious reason that the questions agreed upon for presenta-

tion * * * on the pre-trial hearing did not include these issues" the Court then proceeds to determine the action as if there were no conspiracy, and as if the matter were to be separated into two distinct parts.

The Court takes up the general contract between Struck and the Commission (R. 94) and concludes that this was a "construction" contract, ergo, no violation of the anti-trust laws because the Commission was not buying brick but completed buildings. Then the Court takes up, as if it were another matter, the transaction between Struck and the Southern Company (R. 96, 97) and finds there is no "discrimination" because Southern Brick sold to Struck for the alleged price of $16.75 per M. the same price for which other standard size brick concerns offered to supply brick.

This entirely ignores the gist of the petitioner's action, (Petition, R. 2) that after the bids were opened and petitioner's bid was low, then the respondents entered into an "agreement and plan" to eliminate the competition of the petitioner. It is this conspiracy which is denounced under the Sherman Act. The petitioner does further allege (R. 3) that the means, whereby the illegal plan was to be carried out, was that the price of the brick would be cut by the Southern Company from $18.00 to $14.09, below what it sold to other of its customers, or in the alternative that there would be an indirect reduction through Struck itself making the reduction. The unlawful conspiracy and plan to eliminate the petitioner is not made legal, whether the means to effectuate that plan are innocent or unlawful; nor is it made legal, whether the full price cut was absorbed by Southern Brick Company alone, or by Struck alone, or, as now contended, by both together, i.e. that Southern Brick absorbed the differential between $18.00 and $16.75 per M. and that Struck absorbed the differential between $16.75 and $14.09 per M.

While the District Court cites authorities to the effect that a "construction" contract is not the same as a "sale" contract (R. 80) neither it nor the Court of Appeals cite any authority for the proposition that the Sherman Act does not apply to construction contracts. In fact, the Court of Appeals does not cite a single case, nor does it consider at all the illegal conspiracies denounced by the Sherman Act. We believe the error of the Courts below was induced by their failure to consider the Robinson Patman Act as merely a part of the general anti-trust laws, and to realize that the illegal conspiracy between respondents to eliminate the petitioner was not made legal by the Robinson Patman Act, *unless* respondents brought themselves within the *exception* permitted by the Robinson Patman amendment in the case of *sales* made at a price reduction which made *only* due allowances for differences in the cost of manufacture, sale or delivery; that the exception is not satisfied by showing that the difference was arrived at arbitrarily, in order to "beat" General Shale by $2.00. The exception permitted under the Robinson Patman Act not being applicable, the combination comes under the denunciation of illegal combination to injure a competitor in the Sherman Act.

Conclusion

It is respectfully submitted that the decision in this case is of grave importance; that if allowed to stand, it eliminates the entire construction and building industry from the operation of the anti-trust laws, and may, as a practical matter tremendously limit the scope of the anti-trust laws, both in the construction industry, and as to those persons dealing with any governmental agency, state or national, and that before this decision becomes final it should have the consideration of this Court.

It is further respectfully submitted that this Court should find that the decision of the lower courts incorrectly construed the anti-trust laws and that the action should be reversed for trial upon the merits.

Respectfully submitted,

OLDHAM CLARKE,
HAVETH E. MAU,
ROBERT HOUSTON FRENCH,
Attorneys for Petitioner.

Of Counsel:
ALLEN, MCELWAIN, DINNING & CLARKE,
February 23, 1943.